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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RYAN JUNK et al., Defendant and Appellant, v. ULTIMATE NEV, LLC, Plaintiffs and Respondents.	G056396 (Super. Ct. No. 30-2017-00962659) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Craig L. Griffin, Judge. Affirmed.

Allen Matkins Leck Gamble Mallory & Natsis, Anthony J. Oliva, Alana U. Thorbourne, and Dwight L. Armstrong for Defendant and Appellant.

Orrick, Herrington & Sutcliff, Glenn Dassoff, Abigail Lloyd, Krystal Anderson, Easha Anand; and Kelsi Brown Corkran, *pro hac vice*, for Plaintiffs and Respondents.

* * *

This is an appeal from an order denying a special motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute. (See Code Civ. Proc., § 425.16 (§ 425.16).) The case involves a dispute about whether defendant's former employee breached the nonsolicitation clause in his employment contract and whether defendant's alleged efforts to prevent its competitor from hiring defendant's employees were anticompetitive. As detailed below, we conclude the complaint does not arise from defendant's exercise of its constitutional rights of freedom of speech or petition for the redress of grievances. Although the complaint references protected conduct — namely, defendant's prelitigation cease and desist letter to its former employee — the complaint is not *based on* that conduct. We therefore affirm the trial court's order denying the anti-SLAPP motion.

I.

FACTS

The following facts are taken from the complaint, declarations, and other evidence submitted on the special motion to strike.

Defendant Ultimate NEV, LLC (UNEV) is an extension of the Ultimate Fighting Championship, a leader in the sport of mixed martial arts, and it operates UFC GYM locations across the United States. In May 2017, UNEV hired Plaintiff Ryan Junk as its Signature Division President, a position that involved managing operations for UNEV's Signature Clubs.

When Junk joined UNEV, he signed an employment contract in which he agreed not to "directly or indirectly, solicit, divert or take away any employee . . . of [UNEV] during the course of [his] employment and for the twelve (12) months following any termination of [his] employment with [UNEV]." Junk also agreed to hold in confidence any trade secrets obtained during his employment.

On November 8, 2017, less than six months after starting at UNEV, Junk resigned and accepted a position with Plaintiff Cycle Bar LLC (Cycle Bar) as its

President. Cycle Bar is an indoor cycling franchise and is one of several brands owned by Plaintiff Xponential Fitness, LLC (Xponential). UNEV and Xponential are direct competitors in California's boutique fitness industry.

Around the same time Junk joined Cycle Bar, Cycle Bar posted a job opening on LinkedIn for the position of Regional Sales Director. On November 20, Junk shared the job posting on his personal Facebook page with the comment, "Looking for a Regional Sales Director." Junk's Facebook "friends" included Jesse Kern, the general manager at UNEV's UFC GYM in Huntington Beach. The record is not clear whether Kern actually saw Junk's Facebook post or how Kern learned about the opening at Cycle Bar, but, in any event, Kern applied for the job.

On November 26, UNEV's attorney, Sean Pence, called Junk. According to Junk, Pence told him Kern was considering a job at Cycle Bar, and Pence accused Junk of violating his nonsolicitation agreement, which Junk denied. Pence then instructed Junk to tell Cycle Bar they cannot consider Kern's job application or any future application from other current UFC GYM (UNEV) employees. Pence further told Junk: "'Since you didn't officially offer [Kern] the job yet, just take it back. Tell him he did not get the job. Just don't hire him. It's better for you.'" Pence added: "'It doesn't matter if you follow the rules, if you hire Jesse [Kern], all the bridges that you thought you burned when you left are going to explode. . . . We will have to come after you,'" "'even if you did nothing wrong.'" Pence also told Junk: "'[E]ven if you did nothing wrong, you still have to spend money to defend yourself.'" Junk interpreted the latter comment as a threat Pence would intentionally drive up Junk's legal fees.

Despite Pence's demands, Cycle Bar offered the Regional Sales Director job to Kern. In late November, Kern resigned from UNEV and accepted the job at Cycle Bar.

In early December, another UNEV employee, Austin Daneshmand, left UNEV to accept a position at Cycle Bar. Although the circumstances of Daneshmand's

recruitment to Cycle Bar are not clear from the record, the complaint suggests he was recruited through an independent recruiting agency, not by Junk.

On December 8, UNEV's outside counsel sent Junk a cease and desist letter. The stated purpose of the letter was to "inform [Junk] of possible legal action against [him]," and the letter expressly "reserve[d] the right to initiate litigation against" Junk. The letter expressed concern that Junk had violated his contractual obligations and engaged in unfair competition by soliciting for employment Kern and Daneshmand, and it reminded him of his obligations under the nonsolicitation clause in his UNEV employment contract. The letter asked Junk to sign an enclosed declaration attesting to his full compliance with his nonsolicitation obligations, and announced that if he refused, UNEV "will assume [he] violated [his] contractual and/or statutory duties not to solicit [UNEV's] employees and will respond accordingly." The letter also stated UNEV "will be monitoring [Junk's] activities to ensure that . . . [he] do[es] not solicit [UNEV] employees," adding that if any current UNEV employees leave UNEV to work for Junk or his new employer, UNEV will "hold [Junk] personally responsible." The letter was not addressed to either Cycle Bar or Xponential.

Junk did not sign UNEV's draft declaration. Instead, on December 20, Junk, Xponential, and Cycle Bar (collectively, Plaintiffs) filed a complaint against UNEV for unfair competition and declaratory relief. Per the complaint, their claims arose from UNEV's "attempt to prevent Plaintiffs from engaging in a lawful, competing fitness business" and UNEV's "deliberate scheme to intimidate UNEV's own employees from exploring alternative employment opportunities, and to discourage Xponential and Cycle Bar from hiring UNEV's employees." The complaint alleged in general terms that UNEV had threatened all three Plaintiffs and UNEV employees with litigation "in an effort to annoy, harass and attempt to deter [Plaintiffs] from effectively competing with UNEV,", thereby "chill[ing]" "the marketplace for Plaintiffs to hire employees." It expressly referenced UNEV's cease and desist letter to Junk, but did not provide details

about any other alleged threats. Plaintiffs sought declaratory relief in conjunction with both causes of action as to UNEV's inability to prevent Xponential and Cycle Bar from recruiting UNEV employees, Junk's compliance with his UNEV employment contract, and Junk's right to engage in his profession under Business and Professions Code section 16600 (§ 16600).

In February 2018, UNEV's Executive Chairman, Mark Mastrov, spoke with Bryan Arp several times regarding Arp's dealings with Junk. Arp is a third party independent consultant on digital strategy, and he works with both UFC GYM (operated by UNEV), on the one hand, *and* Xponential and Cycle Bar, on the other hand. On the first call, Mastrov told Arp that Junk is a "bad person" who "didn't do anything" while employed at UFC GYM and who was now "stealing UFC GYM's staff." Mastrov then said "everyone on both sides is going to get dragged into this" and "it [is] going to get ugly." On the second call, Mastrov questioned Arp about his consulting work for Xponential and Cycle Bar, insinuating they were attempting to steal the work Arp had done for UNEV. According to Arp, he interpreted Mastrov's comments as a "veiled threat" that he should stop working for Xponential and Cycle Bar.

Around that same time, UNEV filed an anti-SLAPP motion, seeking a dismissal of Plaintiffs' complaint as an improper lawsuit arising from protected activity. UNEV argued the complaint arose "solely from [its] pre-litigation demand letter," which it contended was protected because it was sent in anticipation of litigation.

In their opposition to the motion, Plaintiffs filed declarations by Junk and Arp, among others, that provided far greater detail about the conduct giving rise to the complaint. For example, these declarations described Pence's November 26, 2017, telephone call to Junk telling him Cycle Bar should not offer a job to Kern or any other UNEV employees, and Mastrov's "veiled" threats to Arp in February 2018. UNEV filed extensive objections to these declarations.

After hearing oral argument, the trial court denied UNEV's motion. It ruled UNEV met the first prong of the anti-SLAPP analysis because the complaint was based "at least in substantial part" on protected activity — UNEV's cease and desist letter. However, it concluded Plaintiffs met the second prong of the anti-SLAPP analysis by establishing "'minimal merit'" to both claims through other nonprivileged evidence. The court also overruled UNEV's evidentiary objections in large part. UNEV timely appealed the court's order.

II.

DISCUSSION

Per the anti-SLAPP statute, "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike." (§ 425.16, subd. (b)(1).) This "provides a procedure for the early dismissal of what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665.)

The Legislature enacted the anti-SLAPP statute in response to "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) "These lawsuits prompted the Legislature to declare that 'it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.' [Citation.] To limit such risks, the anti-SLAPP legislation provides a special motion to strike 'intended to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest.' [Citations.]" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619.)

When a party files a special motion to strike, the anti-SLAPP statute requires the trial court to engage in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

We review a trial court's order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*).) Our analysis is not limited to the allegations of the complaint, as UNEV suggests. Instead, the statue requires us to "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) We therefore consider not only Plaintiffs' complaint, but also the declarations filed in support of and in opposition to the anti-SLAPP motion.[1] We do not weigh the credibility of that evidence and """accept as true the evidence favorable to the plaintiff[s]."""" (*Flatley, supra,* at p. 326.)

Under step one of the anti-SLAPP analysis, we must first determine whether Plaintiffs' claims "aris[e] from" protected activity. (§425.16, subd. (b)(1).) The anti-SLAPP statute's definition of protected activity includes any statement made in a judicial proceeding or in connection with an issue under consideration by a judicial body. (§ 425.16, subd. (e)(1), (2).) Thus, "statements, writings and pleadings in connection

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[1] Although UNEV complains on appeal in general terms about the trial court's evidentiary rulings, it provides no separate argument heading or analysis challenging the court's rulings. We therefore treat the issue as waived (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114) and consider all portions of Plaintiffs' supporting declarations except those the lower court found inadmissible.

with civil litigation are covered by the anti-SLAPP statute." (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) The anti-SLAPP statute also applies to "statements made in anticipation of a court action or other official proceeding," so long as the anticipated litigation is "'contemplated in good faith and under serious consideration.'" (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 887.)

Accordingly, a prelitigation demand letter may constitute protected activity under the anti-SLAPP statute. (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293 ["[o]rdinarily, a demand letter sent in anticipation of litigation is a legitimate speech or petitioning activity that is protected under section 425.16"]; *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1259, 1268-1270 [employer's letter to customers concerning anticipated litigation with former employee over his use of trade secrets was protected activity].) However, an exception to this rule exists where the demand letter constitutes criminal extortion as a matter of law. (*Flatley, supra,* 39 Cal.4th at p. 333.)

UNEV contends the complaint is based "solely" on the cease and desist letter, and the letter is protected activity because it is a prelitigation communication sent in good faith. UNEV therefore argues we must dismiss the entire complaint must be dismissed as a SLAPP lawsuit.

The cease and desist letter may be protected activity. It appears UNEV sent it in anticipation of litigation under serious consideration; indeed, the stated purpose of the letter was to "inform [Junk] of possible legal action against [him]," and the letter expressly "reserve[d] the right to initiate litigation against" Junk. The letter also appears to have been sent in good faith. UNEV reasonably could have believed the nonsolicitation agreement, which did not purport to prevent Junk from *hiring* UNEV employees, was enforceable. (See *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 279 (*Loral*) [declining to invalidate antiraiding provision in employment contract under section 16600]; Ming et al., Cal. Prac. Guide: Employment Litigation (The Rutter Group 2018) ¶ 14:415, p. 14-60 ["contract may prohibit employees, upon termination of their

employment, from soliciting other employees to join a new business," citing *Loral*]; cf. *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc*. (2018) 28 Cal.App.5th 923, 939 [expressing "doubt [about] the continuing viability of" *Loral* after *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937]; *VL Systems, Inc. v. Unisen, Inc*. (2007) 152 Cal.App.4th 708, 718 [no-hire provision unenforceable].) UNEV also reasonably could have believed Junk violated that agreement by posting the Regional Sales Director job posting to his Facebook page considering his Facebook friends included Jesse Kern.[2]

Ultimately, however, we need not decide whether the cease and desist letter is protected activity, because even if it is, Plaintiffs' complaint is not based "s*olely*" on the cease and desist letter as UNEV contends, nor does the complaint "*aris[e] from*" the cease and desist letter. Our Supreme Court recently addressed the "nexus . . . a defendant [must] show between a challenged claim and the defendant's protected activity for the claim to be struck" under the anti-SLAPP statute. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).) The Court explained: "a claim may be struck only if the speech or petitioning activity itself *is the wrong complained of*, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Ibid.*, italics added.) Thus, "a claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity." (*Ibid.*)

"'In deciding whether an action is a SLAPP, the trial court should distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications or prior litigation may provide evidentiary support for the complaint without being a basis of liability.'" (*Park, supra*, 2 Cal.5th at p. 1065.) "'[T]he mere fact

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[2] We express no opinion on whether Junk *actually* violated the provision.

that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.'" (*Id.* at p. 1063.) Further, a cause of action that alleges both protected and unprotected activity is not subject to section 425.16 if the protected conduct is "'merely incidental'" to the unprotected conduct. (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1369.)

Applying those principles here, UNEV did not make a threshold showing that Plaintiffs' claims arose from activity protected under the anti-SLAPP statute. UNEV's cease and desist letter provides evidentiary support for Plaintiffs' allegations, but it is not the basis for liability. Although the complaint mentions the letter to Junk, the complaint as a whole is drafted in broader strokes. For example, Plaintiffs' cause of action for unfair competition accuses UNEV of engaging in unfair competition by threatening *all three Plaintiffs "and other UNEV employees"* — not just Junk — with litigation "in an effort to annoy, harass and attempt to deter them from effectively competing with UNEV", thereby "chill[ing]" "the marketplace for Plaintiffs to hire employees." And both causes of action seek declaratory relief on issues tangential to the cease and desist letter, including whether UNEV can prevent Xponential and Cycle Bar from recruiting UNEV employees. Thus, the four corners of the complaint raise issues beyond UNEV's cease and desist letter, which was addressed to Junk only.

Plaintiffs' supporting declarations confirm this conclusion. As these declarations reflect, the conduct at the heart of Plaintiffs' lawsuit is not limited to UNEV's cease and desist letter. It also includes: (1) UNEV's demand that Junk and Cycle Bar "'take . . . back'" the job offer to Jesse Kern; (2) UNEV's demand that Junk and Cycle Bar not consider job applications from current UNEV employees; (3) UNEV's threat to Junk that if Cycle Bar hires Kern, UNEV will "'come after [him],'" "'even if [he] did nothing wrong'"; (4) UNEV's threat that Junk would have to spend money on attorney fees "'even if [he] did nothing wrong'"; and (5) UNEV's veiled threats to independent contractor Bryan Arp to pressure him into terminating his consulting work

for Plaintiffs. To the extent any of these comments constitute prelitigation statements, they are not protected activity because they do not appear to have been made in good faith.

In short, while UNEV's cease and desist letter is some evidence of the circumstances surrounding the controversy, "that does not convert the [letter] into the basis for liability." (*Park, supra*, 2 Cal.5th at p. 1068.) Indeed, "the elements of [Plaintiffs'] claims do not depend on proof" UNEV sent the cease and desist letter to Junk. (See *ibid.*) Because the cease and desist letter is merely incidental to UNEV's other unprotected conduct, the claims are not subject to the anti-SLAPP statute.

Gotterba v. Travolta (2014) 228 Cal.App.4th 35 (*Gotterba*) is instructive. In *Gotterba*, the plaintiff sought declaratory relief against his former employer concerning the terms of his termination agreement, using the employer's cease and desist letter as evidence of an actual controversy. The trial court denied the employer's anti-SLAPP motion, and the court of appeal affirmed. It reasoned the complaint was "not based upon [the employer's] sabre-rattling letters"; those letters "may have triggered [plaintiff's] complaint and may be evidence in support of the complaint [but] they are not the basis of the complaint." (*Id.* at pp. 41-42.)

As the *Gotterba* court explained, "[i]n deciding whether a lawsuit is a SLAPP action, the trial court must distinguish between speech or petitioning activity that is mere *evidence* related to liability, and liability that is *based on* speech or petitioning activity. [Citation.] 'Prelitigation communications . . . may provide evidentiary support for the complaint without being a basis of liability. An anti-SLAPP motion should be granted if liability is based on speech or petitioning activity itself.'" (*Gotterba, supra*, 228 Cal.App.4th at p. 42.)

The *Gotterba* court also observed "'[t]hat a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such.' [Citation.] The critical issue concerns whether 'the plaintiff's cause of action itself was

based on an act in furtherance of the defendant's right of petition or free speech.' [Citation.] If the threats of litigation were removed from [the employer's] demand letters, the same dispute would exist regarding the terms of the [parties' agreement] . . . . That 'protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a [contract] dispute into a SLAPP suit.'" (*Gotterba, supra*, 228 Cal.App.4th at p. 42.)

The court in *Gotterba* aptly noted: "Acceptance of [the employer's] arguments would lead to the absurd result that a person receiving a demand letter threatening legal action for breach of contract would be precluded from seeking declaratory relief to determine the validity of the contract. Declaratory relief would be limited to situations where the parties have not communicated their disagreement regarding an asserted breach of contract." (*Gotterba, supra*, 228 Cal.App.4th at p. 42.)

Similarly, if the threats of litigation were removed from UNEV's cease and desist letter, the same disputes would exist between the parties as to whether Junk's Facebook post constituted a breach of his nonsolicitation agreement, whether UNEV's subsequent threats to Plaintiffs and others chilled the job market, and whether Cycle Bar and Xponential's recruitment and hiring practices are lawful. We therefore conclude UNEV failed to carry its burden to show Plaintiffs' claims "ar[ose] from" protected activity.

Based on this conclusion, we need not address Plaintiffs' likelihood of prevailing under the second prong of the anti-SLAPP analysis. (*Gotterba, supra*, 228 Cal.App.4th at pp. 43-44 [court need not discuss second prong if defendant fails to establish lawsuit arises from protected activity].) We therefore express no view on the merits of Plaintiffs' case or on the enforceability of the nonsolicitation provision.

III.

DISPOSITION

The order denying UNEV's anti-SLAPP motion is affirmed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.